

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

RONALD JOHNSON

v.

WALTER NELSON et al.

CIVIL ACTION

NO. 98-5919

M E M O R A N D U M

Broderick, J.

December 30, 1998

Plaintiff, an inmate, has filed a pro se 42 U.S.C. § 1983 civil rights complaint against the Assistant Director of Volunteers of America, Walter Nelson, a counselor for Volunteers of America, N. Williams, a counselor for the Pennsylvania Board of Probation and Parole ("the Board") whom Plaintiff identifies as John Doe, the Superintendent for the State Correctional Institution at Dallas ("S.C.I. Dallas"), John Larkin, the past Chairman of the Board, William F. Ward, the present Chairman of the Board, Allen Castor, a Parole Counselor for the Board, Andy Gober, the Institutional Supervisor for the Records Room at SCI Dallas, Mr. Rusnik, the Unit Manager on D-unit at the State Correctional Institution at Houtzdale ("SCI Houtzdale"), Cindy Hoover, the Unit Manager on E-Unit and Head of P.R.C. at SCI Houtzdale, Jay Whitesel, and the Superintendent at SCI Houtzdale, John McCullough. He appears to be alleging that his parole was revoked in violation of his constitutional rights and that he was transferred from SCI Dallas to SCI Houtzdale in retaliation for

his complaints in violation of his constitutional rights.

With his complaint, Plaintiff filed a request for leave to proceed in forma pauperis. This Court, by Order of November 10, 1998 denied Plaintiff's motion for leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915(g) on the grounds that Plaintiff had on "three or more prior occasions while incarcerated" filed civil rights actions in federal court which were dismissed as frivolous or for failure to state a claim upon which relief may be granted. 28 U.S.C. § 1915(g). Plaintiff then sent a letter to this Court which was docketed as a motion for reconsideration of this Court's Order of November 10, 1998 alleging that only two prior actions have been dismissed as frivolous. This motion is now before the Court. For the reasons stated below this Court will grant reconsideration of its November 10, 1998 Order, vacate its November 10, 1998 Order, grant Plaintiff leave to proceed in forma pauperis according to the terms of 28 U.S.C. § 1915(b) and dismiss Plaintiff's complaint as frivolous pursuant to 28 U.S.C. § 1915(e)(2)(B).

Proceedings in forma pauperis are governed by 28 U.S.C. § 1915. Subsection (g) of that section provides:

In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is

under imminent danger of serious physical injury.

28 U.S.C. § 1915(g). Plaintiff has had two previous civil actions dismissed by this Court as frivolous. Plaintiff filed Civil Action Number 95-3977 on June 27, 1995. This action was dismissed as frivolous by this Court on June 29, 1995. Plaintiff filed a notice of appeal of this dismissal on July 27, 1995. Plaintiff's appeal was dismissed as frivolous by the United States Court of Appeals for the Third Circuit on December 15, 1995. Plaintiff then filed Civil Action Number 96-886 on February 6, 1996 making substantially similar allegations to those contained in action 95-3977. Civil Action Number 96-886 was dismissed as frivolous by this Court on February 13, 1996 with leave granted to Plaintiff to amend his complaint to make allegations different from those contained in this previously dismissed action. Plaintiff filed an amended complaint on March 12, 1996. Plaintiff's complaint and amended complaint were dismissed as frivolous by this Court on June 5, 1996.

The Prison Litigation Reform Act ("PLRA"), Pub. L. No. 104-134, 110 Stat. 1321 § 801 , enacted in 1996, amended 28 U.S.C. § 1915(g) to establish the "three strikes" rule for prisoner in forma pauperis petitions. Civil actions filed by prisoners which were dismissed as frivolous prior to the enactment of the PLRA are counted as "strikes" under 28 U.S.C. § 1915(g). Keener v. Pennsylvania Bd. of Probation & Parole, 128 F.3d 143, 144 (3d

Cir. 1997). The language of 28 U.S.C. § 1915(g) refers to civil actions or appeals being dismissed as frivolous. Neither the United States Supreme Court nor the Third Circuit has determined whether or not the appeal of an action dismissed as frivolous which is itself dismissed as frivolous should be counted as an additional strike under 28 U.S.C. § 1915(g). Given this uncertainty, this Court will not treat the appeal of Plaintiff's 1995 action as a separate action. Therefore, the Court finds that Plaintiff has only had two previous civil actions dismissed as frivolous pursuant to 28 U.S.C. § 1915(g) and Plaintiff is not prohibited from proceeding in forma pauperis in this matter. The Court will therefore vacate its Order of November 10, 1998.

Plaintiff's complaint in the instant action contains a copy of his trust fund account statement which appears to comply with the requirements of 28 U.S.C. § 1915(a)(2). It appears from Plaintiff's petition that he meets the requirements for in forma pauperis status under 28 U.S.C. § 1915. As Plaintiff is a prisoner, he is required by the terms of 28 U.S.C. § 1915(b) to pay the full filing fee, even if the Court grants him leave to proceed in forma pauperis. Therefore, the Court will grant Plaintiff's motion to proceed in forma pauperis and direct Plaintiff to comply with the requirements of 28 U.S.C. § 1915(b).

Title 28 U.S.C. Section 1915 directs the Court to dismiss any civil action or appeal if the court determines that the

action is "frivolous or malicious," "fails to state a claim on which relief may be granted," or "seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2). The instant action is substantially similar to two previous actions that Plaintiff filed in this Court. Civil Action 95-3977 was dismissed as frivolous in June 1995. Civil Action 96-886 was dismissed as frivolous in June 1996. Both previous actions alleged that Plaintiff's parole was revoked in violation of his due process rights because his parole was rescinded without a hearing and he was denied the assistance of counsel in connection with his parole proceedings. Plaintiff's complaint in the instant action raises the same allegations. The Court has addressed these allegations in connection with both previous complaints and found them frivolous. The Court will not take the time to address them here. These allegations fail to state an actionable § 1983 claim.

Plaintiff, in all three civil actions, also alleges that he was falsely charged with misconduct for escaping from a community corrections center and testing positive for drug use. Plaintiff alleges that the Defendants violated his due process rights and their own regulations in refusing to hold a hearing on the misconduct and to remove it even though he has demonstrated that it was based on false information. Plaintiff asserts that this false misconduct has been used as a means to deny him parole

since 1992. This Court has already addressed the merits of these allegations in its opinion of June 29, 1995 which dismissed Civil Action 95-3977 as frivolous. The Court will not again address the merits here. These allegations fail to state an actionable § 1983 claim.

Plaintiff's complaint in the instant action attempts to raise claims against several defendants at SCI Houtzdale for their failure to remove this alleged misconduct from his record, even though he has filed a grievance and requested that they do so. The Court has previously dismissed as frivolous allegations by Plaintiff arising out of the refusal of prison officials to remove the misconduct from his record. The fact that the Plaintiff now makes the same allegations against officials at a different prison does not change the validity of these claims. These allegations fail to state an actionable § 1983 claim.

Moreover, all Plaintiff's allegations regarding the misconduct charge are barred by the statute of limitations. As this Court discussed in its opinion of June 29, 1995, Plaintiff's allegations against Defendants on the Board and at SCI Dallas are barred because the actions Plaintiff complains of took place in 1992. Plaintiff, in the instant action, however, alleges that these claims should not be barred because "[t]he filing of this complaint beyond the statute of limitations falls under an exceptional circumstance because the Plaintiff did not receive an

official version of said misconduct until April, 1995, and after numerous requests to staff members." Plaintiff's Complaint at II.b.13. The statute of limitations applicable to this type of action in Pennsylvania is two years. Wilson v. Garcia, 471 U.S. 261, 266-67 (1985). Therefore, all Plaintiff's claims regarding the grievance, even those concerning arising out of the defendants refusal to remove the misconduct from his record when he filed a grievance seeking to do so in 1995, are now time barred.

Finally, Plaintiff's complaint in the instant action appears to raise a new claim that Plaintiff was transferred to SCI Houtzdale in retaliation for filing his previous civil rights actions. This allegation also fails to state an actionable § 1983 claim. Inmates have no constitutionally protected right in avoiding prison transfers. See, e.g., Olim v. Wakinekona, 461 U.S. 238, 244-48 (1983). Nor does a prisoner have a due process right to a hearing prior to an administrative transfer from one prison to another, even if the transfer is for security reasons. Montanye v. Haymes, 427 U.S. 236 (1976). However, if the transfer is a punitive one, then provisions of Pennsylvania law providing for notice and hearing prior to punishment for misconduct create a protected liberty interest which is entitled to due process protections. Reese v. Sparks, 760 F.2d 64, 67 (3d Cir. 1985).

Here, Plaintiff makes no allegation that any named defendant transferred him to SCI Houtzdale as a punitive measure. Further, Plaintiff makes no allegation that any named defendant was in any way involved in his transfer to SCI Houtzdale at all. In fact, in the section entitled "Claim of Relief" Plaintiff makes individual allegations against each named defendant but Plaintiff does not even mention his transfer to SCI Houtzdale. Plaintiff's Complaint at 4-D, 4-E.

Moreover, Plaintiff's claim of a retaliatory transfer to SCI Houtzdale is barred by the statute of limitations. As previously noted, the statute of limitations for this action is two years. Wilson v. Garcia, 471 U.S. 261, 266-67 (1985). Plaintiff's complaint states that he was transferred to SCI Houtzdale in April 1996. Plaintiff's complaint was filed November 9, 1998. Therefore, Plaintiff's claims for retaliatory transfer to SCI Houtzdale are now time barred.

Since Plaintiff's complaint fails to raise any allegations which state an actionable § 1983 claim, his complaint will be dismissed as frivolous pursuant to 28 U.S.C. § 1915(e)(2)(B). An appropriate Order follows.

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ORDER

AND NOW, this 30th day of December, 1998; Plaintiff Ronald Johnson having filed a motion for reconsideration of this Court's Order of November 10, 1998 denying his motion to proceed in forma pauperis; for the reasons stated in this Court's Memorandum of December 30, 1998;

IT IS ORDERED that Plaintiff's motion for reconsideration of this Court's Order of November 10, 1998 is GRANTED;

IT IS FURTHER ORDERED that this Court's Order of November 10, 1998 is VACATED;

IT IS FURTHER ORDERED that Plaintiff's motion to proceed in forma pauperis is GRANTED, provided that Plaintiff complies with the requirements of 28 U.S.C. § 1915(b);

IT IS FURTHER ORDERED that Plaintiff's complaint is
DISMISSED pursuant to 28 U.S.C. § 1915(e)(2)(B).

RAYMOND J. BRODERICK, J.